United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

74-1611

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REA EXPRESS, INC.,

Petitioner,

BROTHERHOOD OF RAILWAY AND
AIRLINE CLERKS, et al.,

Intervenors, No. 74-1611

-against-

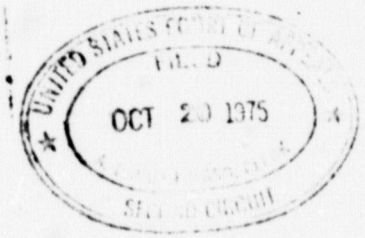
CIVIL AERONAUTICS BOARD,

Respondent,

AIR FREIGHT FORWARDERS
ASSOCIATION, et al.,

Intervenors.

PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING ON EN BANC



REILLY, FLEMING & REILLY
1414 Avenue of the Americas
New York, New York 10019
Tel: 212-759-6582

HIGHSAW & MAHONEY
1015 Eighteenth Street, N.W.
Washington, D.C. 20036
Tel: 202-833-2020

Attorneys for Intervenors
BROTHERHOOD OF RAILWAY AND
AIRLINE CLERKS, et al.

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By a petition for review filed on May 7, 1974, as subsequently amended, REA Express, Inc. [hereinafter, "REA"] sought review by this Court of several orders of the Civil Aeronautics Board [hereinafter, "CAB" or "Board"]. The Brotherhood of Railway and Airline Clerks [hereinafter "BRAC"] moved for leave to intervene, and on June 14, 1974 that motion was granted. On October 6, 1975 this Court issued a decision upholding the Board's action in stripping REA of its

air express service. Intervenor BRAC respectfully contends that this Court erred in its consideration of the employee impact issue, and consequently, BRAC respectfully requests that this Court rehear this case. Also, it is respectfully suggested, that this matter is appropriate for consideration by this Court en banc.

Intervenor BRAC respectfully contends that this Court erred when it upheld the CAB's decision to revoke REA's air express authority by disapproving the air express agreements. In reaching the conclusion that both the old and the amended air express agreements were contrary to the public interest, the CAB failed to consider the impact of its ruling upon the employees of REA until its order of May 1975 which denied reconsideration. And when it did mention the employee impact issue, the Board did so in a cavalier manner which completely disregarded the unrefuted evidence in the record on the adverse consequences of its actions. The Board treated the employee's issue, it is submitted, not as a part of the factors to be considered under Section 412 of the Federal Aviation Act, 49 U.S.C. Section 1382, in balancing where the public interest lies, but rather, as a separate equitable factor to be weighed in determining if it should give effect to its decision. This is not simply a semantic or an academic error but is central

to compliance with the dictates of Section 412, for once the balance is struck, additional factors do not carry the same weight in upsetting that balance as do the original factors in reaching the decision. This Court, it is respectfully suggested, failed to recognize that deficiency in the Board's reasoning process. See, United States v. Lowden, 308 U.S.

Moreover, in upholding the Board's most recent decision (Order 75-5-98), this Court, it is respectfully submitted, upheld a finding of fact not supported by substantial facts of record. The Board, in Order 75-5-98, had concluded that the best chance for the survival of the employment of REA's workers lay in transforming REA to an air freight forwarder. That unsupported conclusion played an important part in this Court's decision that the Board had properly considered the employee impact issue. Slip Op. at 6315. However, the record before the Board did not contain any facts to support that conclusion of fact. Indeed, the evidence before the Board demanded a contrary finding.

BRAC in its answer of December 13, 1974 in support of REA's amended agreement* informed the Board that: "[A]pproximately 40% of its [REA's] revenues are derived from air express and that the loss of these revenues by the termination

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*Hereinafter referred to as BRAC Ans. - Dec. 13, 1974. This amswer was submitted to this Court as Appendix A of the memorandum of BRAC filed in this case in June 1975.

of air express would create a serious danger of bringing all of the REA Express to an end". Id. at 3. That assertion was not refuted by any evidence. Moreover, there was no evidence before the Board to allow it to conclude that REA had the capability to change itself from an air express service to a freight forwarder. Even if REA did have that ability, the time needed to transform its service would surely have caused the demise of a company which already had serious cash flow problems. Affidavits recently filed with this Court in support of a motion to stay the mandate, fortify the conclusion that the facts as they now exist make the transformation of REA to an air freight forwarder impossible.

Finally, it is respectfully submitted that this Court erred in concluding that the failure of the Board to consider whether to impose a proper employee protective provisions upon its regulatory actions was not reviewable because of Section 1006(e), 49 U.S.C. §1486(e). BRAC did raise the issue of the impact of the regulatory action upon the REA employees (BRAC answer in S-Dec. 14, 1974, supra) and by raising that issue the question of whether or not to impose an appropriate labor protective provisions to bring the action within the public interest was before the CAB. ICC v. Railway Labor Executives' Assoc., 315 U.S. 373 (1942); United States v. Lowden, supra. Labor protective provisions, if imposed, are imposed solely to bring the proposed regulatory action within the public interest. Airline Employees Assoc. v. CAB, 413 F.2d 1092 (D.C. Cir. 1969); Accord, United States

v. Lowden, supra, 308 U.S. at 230. Consequently, this Court was in error, it is respectfully submitted, when it concluded that neither BRAC nor REA had "urged [the employee protective condition issue] before the Board...." Section 1006(e). While the employee impact issue was not urged before the Board prior to the issue answer of Order 73-12-36 in December 1973, that failure does not preclude review on that issue since there were "reasonable grounds for failure to do so." Id. BRAC was never made aware of the full scope of the Board's proposed actions prior to the CAB's decision in December 1973 because of the manner in which the Board had sua sponte raised the issue of revoking REA's air express authority.

WHEREFORE, BRAC respectfully requests that this Court reconsider its decision of October 6, 1975 and remand this case to the CAB for consideration upon proper standards of the public interest.

Respectfully submitted,

REILLY, FLEMING & REILLY
1414 Avenue of the Americas
New York, New York 10019
Tel: 212-759-6582

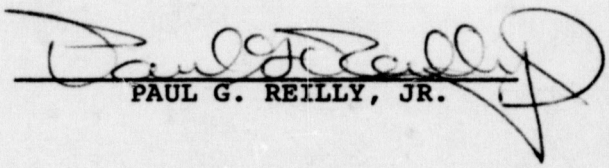
HIGHSAW & MAHONEY
1015 Eighteenth Street, N.W.
Washington, D.C. 20036
Tel: 202-833-2020

Of Counsel:

WILLIAM J. DONLON

CERTIFICATE OF SERVICE

This will certify that the foregoing Petition for Rehearing and Suggestion for Rehearing on En Banc were served by mailing a copy thereof to all counsel of record this 20th day of October, 1975.



PAUL G. REILLY, JR.